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VIA Online Submission

Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: ZRIN 1210-AC02; Retirement Security Rule: Definition of an Investment
Advice Fiduciary

To Whom It May Concern:

Thank you for the opportunity to comment on the Department of Labor's (the DOL) proposed changes to the definition of Investment Advice Fiduciary. This comment is submitted on behalf of the Securities Arbitration Clinic at St. John's University School of Law (the Clinic). The Clinic is part of the St. Vincent De Paul Legal Program, Inc., a not-for-profit legal services organization. The Clinic represents aggrieved investors and is committed to investor education and protection. The Clinic has a strong interest in the rules governing investment professionals and ensuring that these professionals act in their clients' best interests.

The DOL's proposal seeks to amend the definition of Investment Advice Fiduciary for purposes of both Titles I and II of the Employee Retirement Income Security Act (ERISA). These changes are necessary to provide retirement investors with the protections they expect and are entitled to under ERISA. The Clinic strongly supports the proposed amendments.

ERISA sets forth that a person is a fiduciary under the Act if they “render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.”¹ In 1975, the DOL and the Department of the Treasury proposed mirror regulations to provide clarify the definition of the term “fiduciary” under both Titles I and II of ERISA.² These regulations created a five-part test that must be met before an individual would be deemed to be rendering investment advice, and therefore subject to the fiduciary obligations of Titles I and II of ERISA.³ Under the test, an individual must:

- i. Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property
- ii. on a regular basis
- iii. pursuant to a mutual agreement, arrangement or understanding, with the plan or plan fiduciary that
- iv. the advice will serve as the primary basis for investment decisions with respect to plan assets and that
- v. the advice will be individualized based on the particular needs of the plan or IRA.⁴

Under Title I of ERISA, a fiduciary is obligated to discharge their duties solely in the interest of the plan’s participants and beneficiaries and (i) for the exclusive purpose of providing benefits to the participants and their beneficiaries and defraying reasonable expenses of administering the plan; (ii) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (iii) by diversifying the investments of the plan so as to minimize the risk of a large loss; and (iv) in accordance with the documents and instruments

¹ Title I of ERISA provides: “Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.” 29 U.S.C. § 1002(21)(A). Title II of ERISA provides: “For purposes of this section, the term ‘fiduciary’ means any person who—(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (C) has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.” 26 U.S.C. § 4975(e)(3).

² See 40 Fed. Reg. 33560 (Aug. 8, 1975); 40 Fed. Reg. 33561 (Aug. 8, 1975).

³ See 29 C.F.R. § 2510.3-21(c)(1); and 26 C.F.R. § 54.4975-9(c).

⁴ See *id.*

governing the plan insofar as such documents and instruments are consistent with the statute.⁵ Title II prohibits a fiduciary from (i) dealing with plan income or assets in their own interest or for their own account; or (ii) receiving any consideration from any party dealing with the plan in connection with a transaction involving plan income or assets.⁶

This five-part test limited the individuals who are subject to these obligations under ERISA. Under the regulations, investment advice had to be given on a regular basis; be pursuant to a mutual agreement; and serve as the primary basis for investment decisions. However, the statute itself only required that investment advice be given for a fee or other compensation. The additional conditions of the five-part test are not found in the statute itself.

Over time, the ways that investment advice has been rendered to retirement accounts has changed, and as a result, the protections needed by investors have changed. At the time ERISA was enacted and the 1975 five-part test was adopted, most individuals with retirement accounts had employer sponsored defined benefit plans, or pensions. Today, many retirement investors have IRAs or 401(k)s, which require or allow the investor to make investment decisions within the accounts.

Unfortunately, many professionals who provide advice to retirement investors are not subject to ERISA because they do not meet the five-part test. Based on data from mid-2019, three-quarters of households that owned traditional IRAs held them with investment professionals.⁷ Nearly thirty percent were held with full service brokerage firms.⁸ Many brokerage firms use IRA agreements which incorporate terms explicitly disclaiming the components of the 1975 regulations. Specifically, the contracts tend to state either that the firm is not providing advice on a regular basis, or that the advice is not pursuant to a mutual agreement that the advice will serve as the primary basis for the investment decisions. Additionally, some professionals may only provide sporadic or one-time advice. For example, advice to rollover a 401(k) and invest the proceeds may not meet the regular basis prong of the five-part test.

In these cases, the applicable regulations governing the investment advice will vary based on the role of the individual providing advice and the type of investment recommended. For example, an investment adviser who gives advice in connection with an IRA may be subject to the Investment Advisers Act of 1940.⁹ A broker giving securities investment advice in connection with an IRA may be subject to Regulation Best Interest.¹⁰ An insurance broker who recommends that a retirement investor

⁵ See 29 U.S.C. § 1104(a)(1).

⁶ See 26 U.S.C. § 4975(c).

⁷ See Investment Company Institute, *The Role of IRAs in US Households' Savings for Retirement*, 2019, p. 22, <https://www.ici.org/pdf/per25-10.pdf>.

⁸ *Id.*

⁹ See 15 U.S.C. § 80b-1.

¹⁰ See 17 C.F.R. §240.15l-1(a)(1).

rollover their 401(k) into an IRA and then invest in an indexed annuity may be subject to the NAIC's Suitability in Annuity Transactions Model Regulation, if their state has adopted the regulation.¹¹ A professional who gives advice to invest in a bank CD or real estate may not be subject to any of these regulations.

Congress endeavored to adopt a fiduciary standard in ERISA that would be of the highest degree. At the time Congress considered whether it should adopt ERISA, it sought comment from the Securities and Exchange Commission. The Commission limited its comments to the portions of the bill related to fiduciary standards. The Commission noted that the fiduciary standards proposed were, in some respects, more extensive than those contained in the Investment Company Act of 1940.¹² The Commission expressed support for the proposed fiduciary standards contained within the bill.¹³

The Commission recognized that ERISA's fiduciary obligations are more extensive than those governing investment advisers. The Commission also has acknowledged that Regulation Best Interest is not a fiduciary standard, although it draws on key principles underlying fiduciary obligations.¹⁴ The NAIC's Suitability in Annuity Transactions Model Regulation is not a fiduciary standard.¹⁵ Accordingly, investment advice professionals who currently do not meet the five-part test, but provide investment advice in connection with retirement accounts, are not subject to the stringent fiduciary obligations of ERISA.

The DOL's present proposal strikes the right balance in its approach to defining those who will be deemed to be providing investment advice for purposes of ERISA. In part, the DOL proposes that a person would be an investment advice fiduciary if the recommendation is provided for a fee or other compensation in the following contexts:

The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances

¹¹ The NAIC's Suitability in Annuity Transactions Model Regulation is available at <https://content.naic.org/sites/default/files/model-law-275.pdf>. A summary of the regulation, including a map of the states that have adopted the regulation are available at <https://content.naic.org/sites/default/files/government-affairs-brief-annuity-suitability-best-interest-model.pdf>.

¹² See S. Rep No. 92-1150, at 61 (1972).

¹³ See *id.* at 63.

¹⁴ See Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019).

¹⁵ See NAIC Suitability in Annuity Transactions Model Regulation (#275) Frequently Asked Questions at Q1 (July 2021), available at <https://content.naic.org/sites/default/files/inline-files/Final%20FAQ%20July%202021.pdf>.

of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.¹⁶

This definition will capture the professionals who give advice to retirement investors, and who the retirement investors believe are obligated to act in their best interests. It will also ensure that retirement investors receive uniform investor protections, regardless of the investment being recommended or the professional making the recommendation. It will also ensure that the regulations connected with ERISA actually are consistent with the statute. For too long, the regulations have improperly limited the applicability of ERISA, and have undermined the protections Congress set out to provide to retirement investors when it first adopted the Act.

Accordingly, the Clinic supports the proposal. It fills a gap in investor protection and ensures that the highest fiduciary standards will apply to those who provide investment advice to retirement investors.

Sincerely,

/s/

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Director of the Securities Arbitration Clinic

/s/

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¹⁶ Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75,890 (Nov. 3, 2023).